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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

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No. 147  
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SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

PAULINE G. JESTER, AS ADMINISTRATRIX OF THE ESTATE OF  
CLAUDE V. JESTER, DECEASED, *Respondent.*

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE  
OF SOUTH CAROLINA

\_\_\_\_\_  
JAMES H. PRICE,

JAMES D. POAG,

GREENVILLE, S. C.

*Attorneys for the Respondent.*

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v.

PAULINE G. JESTER, as Administratrix of the Estate of  
Claude V. Jester, deceased, *Respondent*

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**PRELIMINARY STATEMENT**

On June 30, 1943, the respondent herein, as Administratrix of the intestate estate of Claude V. Jester, brought action against the petitioner, Southern Railway Company, under the Federal Employers' Liability Act for the death of her husband on July 28, 1942. The complaint alleged that her husband, who was the father of her two minor children, Mary Elizabeth, age 11 years, and Vestel, Jr., age 5 years, had been shot and killed by his engineer, C. H. Black, while both were engaged in the active discharge of their duty upon one of petitioner's freight trains.

The case came on for trial in the Greenville County Court of Common Pleas on September 22, 1943, before Circuit Judge the Honorable E. C. Dennis, and a jury. At the conclusion of the evidence, petitioner's counsel made a motion to the trial Judge for a directed verdict upon grounds shown in the rec-

ord. This motion was refused. Full argument was made by counsel for both parties to the jury and after an able and complete charge by the trial Judge, as to which the petitioner has never raised the slightest question, the jury, on September 22, 1943, returned a verdict for respondent for \$30,000. Petitioner noted a motion for a new trial, which was argued on October 21, 1943, and was made upon the ground set forth in the record, namely, that respondent had failed to produce evidence sufficient to make a jury issue that the engineer at the time he shot and killed the deceased was acting within the scope of his agency. On October 22, 1943, Judge Dennis passed an Order, set forth in the record, overruling this motion. Petitioner then appealed to the State Supreme Court. That Court heard the appeal on March 14, 1944. On April 7, 1944, a unanimous opinion of the Supreme Court was filed affirming the verdict and judgment below. The opinion is printed in full in the record. Within the time allowed by law, petitioner filed a petition for rehearing, which is set forth in the record. Thereafter, the State Supreme Court dismissed the petition for rehearing and petitioner at once gave notice that it would apply to this Court for a Writ of Certiorari to the Supreme Court of the State of South Carolina.

### QUESTION PRESENTED

"The sole issue in this appeal is whether or not the testimony adduced upon the trial of the case was sufficient to require the submission to the jury of the question if the engineer, C. H. Black, in the shooting of C. V. Jester, the fireman, was acting within the scope of his agency and in the furtherance of the appellant's business." (This is the exact language of the unanimous opinion of the South Carolina Supreme Court in this case. See Record, Pages 52-53). It had likewise been the sole issue upon which the petitioner's counsel presented the case to the trial Court in Greenville County; it was the sole ground upon which counsel asked an experienced State Circuit Judge for a new trial.

Now, in an adroitly worded petition, counsel for the peti-

tioner seek to greatly widen the issue and insert other matters, such as the difference between a simple assault and a wilful or malicious assault, and that a homicide committed by an employee is not covered by the Federal Employers' Liability Act.

Petitioner will not be permitted by an avalanche of words to change a simple issue of fact into much more complicated questions of law.

### STATEMENT OF FACTS

The statement of facts given by the South Carolina Supreme Court at pages 53 to 55 of the record, is reasonably brief and clear. To this statement of facts we would make one or two additions.

We think the most significant fact that underlies this whole case is that the testimony shows that the engineer and fireman were apparently on the best of terms before that particular time. The conductor, G. O. Short, testified that up to that time he had never noticed any trouble at all between the two men. (Record, Folio 53, page 16). He further stated that the engineer did not report to him that they had differed about anything except the water injector. (Record, Folio 57, Page 17).

Other than these references, the record is utterly silent and we have a right to assume that the men had never had any misunderstanding about any personal or private matter. The only issue between them was the question of the use of the water injector and the record positively shows that each side of the engine was equipped with an injector. (Record Folio 54, Page 16).

Second: We shall also add an enumerated list of facts and circumstances which the trial Court and jury had before them upon the issue of whether or not the engineer was acting within the scope of his agency at the time, to-wit:

(1) He (the engineer) was employed principally to oper-

ate steam engines for the Southern Railway Company — (Folio 80).

(2) He was engaged in this particular duty at the precise moment in question. He stopped the engine, got down off of his seat and in two or three seconds shot the deceased— (Folios 63, 65, 85, and 89).

(3) He was charged with the duty of instructing and ordering the fireman in the performance of his duties — (Folios 80-81).

(4) He was in charge of the engine — (Folio 95).

(5) Only a short time before he informed the conductor that he had ordered the fireman to keep his hands off of the water injector and the fireman "wouldn't do it."—(Folio 52).

(6) The only controversy between the two men was about the use of the water injector. There was an injector on each side of the engine, and no rule forbid the fireman to use the one on his side. — (Folios 53, 54, 55).

(7) No other matter was involved between the two men. There was absolutely no evidence of any difference about personal matters, money obligations or anything else. The water injector was the sole and only cause of dispute between them—(Folio 57).

(8) The railway company offered no evidence at all of any personal difference of any kind between them and there is not even a hint of such difference in the testimony.

(9) The conductor, without attempting to settle the injector issue, ordered the men back to work.—(Folio 57).

(10) As the fireman had asserted his right to use the injector in performance of his duty to keep steam up to the proper guage, the reasonable inference to be drawn is that he continued to do so. — (R. Folio 52).

(11) The operation of the engine required the use of the water injector every fifteen or thirty minutes.—(R. Folio 73, Page 21).

(12) The only reasonable inference to draw from these foregoing circumstances is that the engineer decided to enforce his orders upon the fireman when he continued to use the water injector after the incident narrated by the conductor.—(Folio 52).

(13) The only reasonable inference, or it is at least a most reasonable inference to draw, is that the fireman used the injector, turned water into the engine and got down in front of the fire door to shovel coal when assaulted by the engineer.—(Folios 75, 76 and 84).

(14) The conductor felt the engine stop and looking down the side of the train saw the engineer get off of his seat box —(Folio 63) and saw the engineer disappear from sight in the direction of the fireman's side. — (Folio 85).

(15) Only the engineer could have stopped the engine as the throttle and breaks were on his side—(Folio 97).

(16) The fireman's cap, glove and coal scoop were all found together in the center of the deck of the engine, the deck being the floor space between the engineer's and fireman's seats — (Folios 77 and 84).

(17) The fireman's exclamation, "Oh, Lordy, Dick," was an exclamation of surprise and appeal, not that of a man who had started a fight with a much bigger man.

(18) The statement of the conductor that it appeared that the two were grappled together (Folio 86) merely indicates that in desperation the smaller man, after the first shot, tried to close with his powerful opponent in order to knock aside the pistol. He could never have pushed the huge engineer out of the engine.

(19) The conductor was looking down the sides of the cars and could see the engineer's seat but the fireman, of course, was not in sight. — (Folio 64). This indicates that the engineer went to the fireman and not that the fireman approached the engineer.

All authorities agree that preeminent among the facts and

circumstances to be considered in solving the question of whether or not an agent is acting within the scope of his agency are those of time and place, (35 Am. Jur. page 987), so we add to the facts and circumstances above set forth—

(20) Time—It was in the very midst of the most active hours of duty, both men only a moment or two before the shot was fired having been engaged in their respective duties, the engineer operating the engine and the fireman firing the same.

(21) Place—On the freight engine where both were working, the engineer stopped the engine, went to the deceased who was apparently in the center of the deck—(Folio 84) and the fatal difficulty took place there.

(22) The injector is a lever which the operator pulls down and it puts water in the boiler. It is only a step or two from where the fireman's cap, glove and coal scoop were found in the center of the engine deck—(Record, Folio 54, Page 16).

## ARGUMENT

It will be seen that the evidence before the trial Court and jury was both direct and circumstantial. The conductor heard and saw part of the fatal encounter but could not tell the exact words which were spoken between the two men leading up to the shooting. The conductor did testify, however, that not over an hour and a half before the two men were engaged in an argument as to the use of the water injector and there is absolutely no testimony that they ever disagreed about any other matter. The petitioner has contended throughout that the circumstantial evidence, together with the direct evidence, and the legitimate inferences to be drawn from that testimony, made a jury issue as to whether or not the respondent, plaintiff below, had established the allegations of her complaint. Almost every Supreme Court in the United States has held that all issues involved in a negligence case may be established by circumstantial as well as by direct evidence.

One of the leading cases from the United States Supreme Court upon circumstantial evidence in the case like the one at bar is that of *Choctaw, O. & G. R. Co., v. McDade*, 191 U. S. 64; 48 L. Ed., 96; 24 Sup. Ct. Rep. 24, in which the Court said:

"There was no eyewitness as to the exact manner of the injury to McDade, and it is urged that the court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given."

Innumerable South Carolina Supreme Court decisions have been rendered along the same line. We cited many such decisions in our Brief before the Supreme Court but will mention only one or two here. One of these South Carolina decisions is that of *Thornton vs. S. A. L. Ry. Co.*, 98 S. C., 348; 82 S. E., 443.

Upon other grounds this decision was reversed by the United States Supreme Court—(238 U. S., 606; 59 L. Ed., 1485; 35 Sup. Ct. Rep. 601).

Another case is that of *Mulligan vs. A. C. L. Ry. Co.*, 104 S. C., 173; 88 S. E., 445. In that case the State Supreme Court sustained a verdict for the plaintiff under the Federal Employers' Liability Act. In that case only circumstantial evidence was produced. The same Justice wrote the opinion in both of these decisions. In the first case cited, as to the effect of circumstantial evidence in a negligence case, he said:

"A case is usually made out by the positive testimony of eyewitnesses, to a transaction, who swear they saw the occurrence, and describe how it occurred. In this case we have no positive testimony as to how it occurred

as no witnesses saw how it happened, and we must resort to the evidence of circumstances to arrive at a conclusion as to how it occurred, and say whether or not there was sufficient evidence in the case for his Honor to submit the question to the jury, as to whether or not deceased was killed negligently, by the defendant, in any of the particulars alleged and specified in the complaint."

In the Mulligan case the Supreme Court said:

"It is not essential that in establishing liability and proving negligence that there must be eyewitnesses to the transactions to establish the fact or be direct, but the evidence can be either direct or circumstantial. The plaintiff assumed the burden of furnishing evidence, but the proof may be either direct or circumstantial."

The decision later quoted from the Thornton case as to circumstantial evidence is as follows:

"It has been held in the case of *Thornton v. Railway*, 98, S. C., 349, 82 S. E., 433, and authorities therein cited:

"'In an action for negligent injuries or wrongful death, plaintiff's failure to prove one of the several acts of negligence alleged does not warrant a direction of a verdict for the defendant. Where the servant of a railroad was run down in the yards, but there were no eyewitnesses to his death, it will not be presumed that he intended to commit suicide, and threw himself under the cars, but it will be presumed that he was attempting to carry out his duties with due care. While negligence cannot be presumed, but must be proved, it may be established by circumstantial evidence. If there is no competent evidence to go to the jury, a nonsuit should be granted."

The United States Supreme Court affirmed the judgment in the Mulligan case, *supra*, in a memoranda opinion reported in 242 U. S., 620; 61 L. Ed., 522; 37 Sup. Ct. Rep., 241.

## ISSUE OF FACT ONLY

We quote from petitioner's Brief before the Supreme Court of South Carolina at page 18 as follows:

"While the exceptions are four in number, they raise practically the same question; which is that the testimony fails to show that the engineer, in shooting the fireman, was acting within the scope of his agency and in furtherance of the defendant's business, and that the jury to so conclude must rely solely upon conjecture.

"It will be noted that all the cases cited are in harmony as to the law. It is only in the application of the law to the facts that they vary."

Five times petitioner has appealed to State tribunals to agree with it and its counsel that the testimony at the trial "fails to show" that the engineer in shooting the fireman was acting within the scope of his agency.

The first appeal was made on September 22, 1943, to Honorable E. C. Dennis, one of the senior South Carolina Circuit Judges. Judge Dennis took the oath of office as Circuit Judge on January 17, 1923, (See statistical page, frontispiece, Vol. 123, S. C. Law Reports (N. S.).

Upon the conclusion of all of the evidence, counsel for the petitioner asked this able and experienced Judge for a directed verdict in its favor—(Record, Folios 115-118, pages 31 and 32). Judge Dennis in a succinct order from the bench, refused the motion—(Record, Folio 119, Page 32).

Petitioner's second appeal was made by its counsel to a jury of twelve citizens of South Carolina, who, under the Constitution and laws of the State, were the sole triers of the facts. This Court can read between the lines that counsel made an able argument to the jury, to the effect that the engineer and fireman had engaged in a private fight for personal reasons and that the engineer was not acting within

the scope of his agency at the time and, therefore, that the company was not liable.

Judge Dennis charged the jury clearly and completely as to the law. Able counsel for the petitioner have not in the slightest manner questioned the correctness of any phase of the instructions given by the trial Judge to the jury. More than once he instructed the jury that the main basis of the action was that the engineer was acting within the scope of his authority and that if he was not the company could not be held liable.

Judge Dennis further charged the jury that if it was a mere personal fight, or private fight, between the two men for personal reasons, the petitioner would not be liable.—(R. Folio 152; Page 40).

Contributory negligence on the part of a deceased employee under the Federal Employers' Liability Act only reduces the damages and is not a defense; yet, Judge Dennis charged the jury in connection with the now discarded defense of self-defense as follows:

"I charge you that if the defendant has established either or both of these allegations by the greater weight of the evidence, that would be sufficient to make out the plea of contributory negligence, and I charge you further that if you find that the deceased did those acts, then the plaintiff cannot recover at all and your verdict should be for the defendant."—(R. Folio 167; Page 44).

The jury, which by its verdict eliminating the cause of action for pain and suffering, showed that it was a jury of intelligence and discretion, rejected petitioner's appeal and found as a matter of fact that there was negligence on the part of the engineer and that at the time of his wrongful act he was engaged in the discharge of his duties as engineer and was acting within the scope of his agency.

Just here permit us to say that counsel for petitioner argued self-defense with great zeal to the jury and continued to

do so before the State Supreme Court—(Appellant's brief in State Supreme Court, pages 19 and 22), but now this defense seems to be entirely abandoned by the combined counsel for the railway company—(Petitioner's brief and petition, page 9).

The third attempt to get State tribunals to agree with petitioner was made in an elaborate motion for a new trial before Judge Dennis, heard on October 21, 1943, a month after the jury's verdict. Counsel had ample time to think of everything possible upon which to base the motion but based it (other than a weak charge that the verdict was excessive) solely upon the ground that the evidence was not sufficient to substantiate the allegations of the complaint that the engineer at the time he shot and killed the plaintiff's deceased was engaged in his duties as engineer and within the scope of his agency—(Record, Folio 174, Page 46).

Again Judge Dennis heard full argument by counsel and "duly considered the matter." (Record, Folio 175, page 46). As to this ground of the motion, he held:

"The Court is of the opinion that there was evidence to go to the jury upon the question of negligence and upon the question as to whether or not the engineer at the time he shot and killed the deceased was engaged in his duties as engineer and acting within the scope of his agency.

"In my general charge, I charged the jury as to the law along this line. The stenographer's transcript shows the following special request by Mr. Bonham, attorney for the railway company:

"By Mr. Bonham: In charging the jury, your Honor, you used the expression: 'Was the engineer at the time engaged in the discharge of his duties as engineer.' I think that under the law it would require more than that. Not only that Mr. Black was engaged in the performance of his duty, but that he was engaged in carrying out his work which was assigned to him.

"The Court: That is correct. Not only must he have been engaged in the performance of his duty as engineer, but engaged in work assigned to him in the scope of his agency as engineer, and in the performance of his duty in the actual scope of his agency as engineer in enforcing his orders with reference to the duties required of the fireman.'

"I think that there was evidence to go to the jury upon these issues and cannot sustain the motion upon this ground."

The fourth appeal to the State Courts was made to the Supreme Court of South Carolina. Counsel submitted an elaborate 26 page printed brief and made an able oral argument to the Court.

The Supreme Court refused to reverse the lower Court and overruled petitioner's contention that it was not a jury issue.

It seems to us that the unanimous opinion of the State Supreme Court written by Chief Justice Baker and concurred in by Justices Fishburne, Stukes and Oxner, is clear and complete and showed that they had considered all points raised by the petitioner.

Nevertheless, counsel for the railway company filed a petition for a rehearing, its fifth appeal to the State Courts.

Under the South Carolina practice, a petition for rehearing is not served upon the attorneys for a respondent and the first we knew of the petition in this case was when we were served with a copy of the printed Transcript of Record herein.

A mere glance at this petition (Record, pages 62-64), shows that counsel again argued the facts of the case to the State Supreme Court.

Here counsel seemed to get a little consolation from the dicta language of Judge Baker in overruling the petition for rehearing. Under the South Carolina practice the petition for rehearing first goes to the Justice writing the opinion. As

Judge Baker wrote the opinion the petition for rehearing, naturally, went to him and he evidently thought that the other members of the Court would concur with him in his dicta, but the other three Justices were entirely satisfied with the able opinion which they had signed, and refused to approve Judge Baker's language and said: "We concur in the result of the foregoing order; *we think the case was correctly decided and, therefore, that the petition for rehearing should be denied.*" (Record, page 65)—(Italics ours).

**THE CASE OF TENNANT vs. PEORIA & PEKIN  
UNION RY. COMPANY**

It seems to us that this is a proper place in our brief to discuss the case of *Mary Tennant, Administratrix, vs. Peoria and Pekin Union Ry. Company*, 321 U. S., 29; 88 L. Ed., 322. Counsel for petitioner at page 18 of their brief contend that the Court below was "controlled in its decision in this case by a misinterpretation of the scope and effect of this Court's opinion in the Tennant case." This position is utterly untenable and indicates how, in their desperation, counsel will literally grasp at a straw.

There is not the slightest intimation in the record that the South Carolina Supreme Court misinterpreted this recent decision. Judge Baker's dicta language in the Order overruling the petition for rehearing, cannot be construed into such an intimation.

The legal history of the reference to this case by the State Supreme Court is most interesting.

The Tenant case was argued before this Court on December 15, 1943, and decided January 17, 1944. It was not referred to in the main brief of petitioner before the State Supreme Court.

In respondent's brief we relied almost entirely upon decisions of this Court. We had prepared a brief for use during the trial and merely enlarged upon it in the Supreme

Court. We made no reference to the numerous United States District Court and Circuit Court of Appeals decisions which may have had some minor bearing upon the law involved.

The State appeal was argued on March 14, 1944. On March 9, 1944, petitioner had filed a Reply Brief in which the Tenant case was mentioned for the first time. (See pages 5 and 6 of petitioner's Reply Brief in the South Carolina Supreme Court). It was referred to only as a decision of the Seventh Circuit Court of Appeals, 134 Fed. (2d), page 860.

The attorneys for the Southern Railway quoted at length from this decision, using almost two printed pages of their Brief to bring it prominently before the Court. Counsel referred to it in the oral argument and urged the South Carolina Court to adopt the language of that Court to the effect that the Administratrix of the deceased could not recover if there were several different inferences and theories shown by the testimony. After quoting from the opinion, counsel on page 6 of the Reply Brief, concluded:

"We submit that the instant case is susceptible to various inferences and theories for most of which the employer is not liable. It is possible to assume, if one ignores the lack of evidence, that the engineer shot the fireman to enforce an order about the use of the water injector. There is certainly some testimony to show that the engineer acted in self-defense. It may be, as the respondent urges, that the fireman was using the coal scoop and the engineer got down from his seat and shot the fireman out of pure vindictiveness. It is conceivable that because of the ill feeling between the two men, which arose out of the first quarrel, another dispute arose which ended in the fatal encounter. So far as the evidence reveals the fight may have come about because of something in no way connected with anything which had gone before."

Several days after the argument in the State Supreme Court, counsel discovered that they had relied upon a case which had been completely reversed by this Court and on March 23, 1944, addressed a letter to all of the Justices participating in the hearing. We replied to this letter. (The letters of counsel are a part of the briefs in the case).

The first paragraph of their letter is as follows:

"In fairness to the Court and to ourselves and to opposing counsel in the above stated matter, we feel it our duty to call the Court's attention to the fact that a case cited in our reply brief had been reversed by the United States Supreme Court at the time that the case was cited. We feel sure that the Court will know that we cited the case in good faith and that we did not know at the time that we quoted it, as authority, that it had been reversed. "The case cited is *Tennant v. Peoria & Pekin Ry. Co.*, 134 Fed. (2d), 860."

Then follows an attempt to explain away the effect of the opinion of this Court and to minimize its force and effect. Counsel then said:

"While it might be assumed that, by citing the *Tennant* case, we suggest that there are inferences to which the testimony is susceptible which would support the theory of liability, it will be noted by reference to the inferences to which we suggest the testimony is susceptible that none really sustains a basis of liability. We think we have suggested all the inferences to which the testimony is susceptible and that none of them so far as we can see is a basis of liability. If you will refer to our reply brief, you will see that on page 6 and 7 we suggest five possible inferences to which the testimony is susceptible:

(1) It is possible to assume, if one ignores the lack of evidence, that the engineer shot the fireman to enforce an order about the use of the water injector.

(2) There is certainly some testimony to show that the

engineer acted in self-defense.

(3) It may be, as the respondent urges, that the fireman was using the coal scoop and the engineer got down from his seat and shot the fireman out of pure vindictiveness.

(4) It is conceivable that because of the ill feeling between the two men, which arose out of the first quarrel, another dispute arose which ended in the fatal encounter.

(5) So far as the evidence reveals the fight may have come about because of something in no way connected with anything which had gone before.

"As we argued in our main brief and in our oral argument to the Court, none of these theories can be the basis of liability. Only in the circumstances of the first suggested inference could liability arise, but, as you will note, for such an inference to arise one must ignore the lack of evidence and rely entirely upon conjecture.

"The Tennant case has no application to the instant case except insofar as it holds that speculation will not be allowed to do duty for probative facts, for the reason that in the Tennant case there was no question but that there was proof of actual negligence and the real question was whether or not such negligence was the proximate cause of the injury. There was proof in the Tennant case that the engineer had failed to ring the bell as required by the rules of the company, which rules were for the protection and benefit of trainmen engaged as was the plaintiff's intestate and there was further proof that the plaintiff's intestate had been killed at a place where he should have been in the performance of his duties. While the testimony might have been susceptible to other inferences and theories, the Supreme Court felt that the jury should be left to decide whether or not the established negligence was the proximate cause of the injury. The position we have intended to take and feel that we have taken all the way through is that in the instant case there was no evidence of negligence and that

such a conclusion can be reached only by conjecture. "While writing this it has occurred to us that it might be well for the Court to look at the case of *Williamson vs. Southern Railway Co.*, 183 S. C., 312, where on page 324 it is said: 'Verdicts cannot be allowed to rest upon mere surmise, conjecture, or caprice.' "

Now counsel assert that the Tennant case is all important because the South Carolina Court "misinterpreted" the opinion of this Court.

### AMPLE EVIDENCE OF NEGLIGENCE IN CASE AT BAR

Counsel for the petitioner seek to distinguish the Tennant case and this case by saying that in the former there was "proof of actual negligence," but in the instant case there "was no evidence of negligence."

Unless the defense of self-defense on the part of the engineer is accepted, the evidence of negligence is overwhelming.

In view of the language of the State Supreme Court as to the defense of self-defense, this issue should be completely discarded. The Supreme Court said:

"We can disregard the statement of the engineer, Black, made to the conductor, Short, immediately following the shooting of the fireman, Jester, that he had to do it, that he (Jester) was after him with a hammer, because the circumstantial evidence in the case as to the hammer, being in the same place after the difficulty as before, would have made an issue for the jury to decide whether Black, at the time of shooting Jester, was acting in self-defense."

It follows as an inevitable conclusion that if the engineer did not shoot in self-defense, then his act was negligence under the Federal Employers' Liability Act.

*The only issue, therefore, is whether the wrongful act of the engineer was perpetuated while he was in the discharge of his duties and acting within the scope of his agency.*

The Federal Employers' Liability Act not only makes the carrier liable for its negligence but also for that of its "officers, agents or employees."

Engineer Black's negligence or wrongful act is overwhelmingly established by the evidence.

The evidence, both direct and circumstantial, that the engineer was acting as engineer at the time of the wrongful act and within the scope of his agency is almost as strong and complete. In any event, the evidence was sufficient to raise a jury issue as to whether or not he was acting within the scope of his authority or that it was a "mere private fight between the two men for personal reasons."

Just here, it is significant that in the charge of Judge Dennis to the jury he used almost the identical words used by the trial Judge in the Encarnacion case, *infra*, and which were approved by this Court.

We quote from the opinion of this Court in the Encarnacion case as follows:

"The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference, but that, if the foreman in the course of his employment committed an unprovoked assault upon plaintiff in furtherance of defendant's work plaintiff might recover."

Judge Dennis' charge along this line will be found in the record, Folio 151, page 40.

Throughout this case we have based our right of recovery upon the Encarnacion and Cain cases, *infra*, which are set forth fully in the last part of this brief.

It will be recalled that in the Encarnacion case the plaintiff recovered a verdict in the trial Court, which was reversed by

the Supreme Court of New York. That Court took exactly the same view that the petitioner does here, namely that the employer was not liable for the assault and battery of its agent even though he was acting within the scope of his agency.

The New York Court of Appeals, however, reversed the Supreme Court and upheld the judgment based upon the verdict of the jury. As elsewhere stated in this brief, the late Justice Cardozo was then a member of the New York Court of Appeals and participated in its opinion. In its opinion, the New York Court of Appeals said:

" 'Defendants' testator was an employing stevedore. Plaintiff was one of his employees who was assaulted by the foreman or gang boss in charge of a gang engaged in loading a barge in the East River. The evidence justifies the inference that the foreman, in an effort to carry out his orders to keep the men busy and in furtherance of the employer's work, assaulted plaintiff, an employee subject to his orders, to make him hurry up with the work in which he was engaged. No question of negligence is in the case. The trial judge allowed a recovery, if the jury found that 'the assault was committed in the furtherance of the master's work.' *Mott v. Consumers' Ice Co.* 73 N. Y., 543, 547. The jury so found. The Appellate Division reversed, applying the fellow servant rule, and holding that there was no liability on the part of the employer, even though the foreman inflicted the injuries when he was engaged in hurrying up the work in obedience to the employers' orders."

### CORRECT INTERPRETATION OF TENNANT CASE

As to the effect of the Tennant case, we respectfully submit that it is clear that the State Supreme Court referred to this opinion because of the importance attached by petition to the decision of the Circuit Court of Appeals therein. We respectfully submit that the opinion of this Court in the Ten-

nant case simply follows a long line of decisions of this Court decided under the Federal Employers' Liability Act.

This Court did reverse the Circuit Court of Appeals of the Seventh Circuit as to its erroneous holdings as to the effect of "conflicting inferences and conclusions." There is absolutely nothing in your opinion "*narrowing the rule as to the granting of non-suits and direction of verdict.*"—(Italics ours.)

A mere glance at the wording of the opinion in the Tennant case will show that we are correct in this conclusion.

### UNDER FEDERAL EMPLOYERS' LIABILITY ACT WILFUL ACTS ARE INCLUDED IN THE TERM OF "NEGLIGENCE"

Throughout this case, until the present time, counsel for petitioner have conceded that if the engineer was acting within the scope of his agency that there was no difference between a wilful act and a negligent act.

Judge Dennis so charged the jury (Record, Folio 146, page 39), and no exception of the slightest nature has been taken of the correctness of the charge.

In their brief to the State Supreme Court, at page 7, the Attorneys for petitioner said:

"The law applicable to this case is simple. Succinctly stated it is that an employer is not liable for the wrongful attack by one employee upon another, unless the assailant is acting within the scope of his employment, while in the discharge of a duty owing the employer, and the assault is made in furtherance of the employer's business. If the assault is made for purely personal reasons, the employer is not liable."

In their brief here counsel for the petitioner spend much time in making distinctions between "simple assaults" and "murderous assaults." They speak about "non-murderous

assaults" and "wilful assaults." They characterize the assaults and batteries in the Encarnacion and Cain cases as "simple non-murderous, though wilful assaults." They draw a distinction between "injury" from an assault and a "death" due to "intentional, malicious homicide or murder"—(Page 10, Petition and Brief).

In the first place the Act does not distinguish between liability for "injury" and "death." The Federal Liability Act sets up the same standards of liability and right of action regardless of whether it be a case of "injury" resulting, for example, in the loss of a leg or arm, or a case of "death" resulting in the loss of the sole and only support of a young widow and two small children, as in the case at bar.

The law of South Carolina makes no distinction in defining murder and assault and battery with intention to kill, or as between assault and battery of a high and aggravated nature and manslaughter, except that in one type of case the assaulted party lives and in the other he dies.

In the case of *State v. Jones*, 130 S. E., 747; 133 S. C., 167, the Court said:

"While there is no statutory definition of the offense of 'assault and battery' in this state, common usage for convenience has divided the offense into three degrees: (1) Assault and battery with intent to kill and murder; (2) assault and battery of a high and aggravated nature; (3) simple assault and battery. The division is intended more for the purpose of imposing sentence than of establishing distinct crimes or degrees of a crime. For the sake of brevity these divisions will be referred to as of the first, second, and third degrees.

"The first degree contains all of the elements of murder except the actual death of the person assaulted; so that before the accused can be convicted of this charge, the jury must be satisfied beyond a reasonable doubt, from the evidence, that if the party assaulted had died as a result of the injury, the defendant would have been

guilty of 'murder', which is defined in section 1 of the Criminal Code, as 'the killing of any person with malice aforethought, either express or implied.' It is apparent that there must be, not simply the intent to kill, for that may be present in a case of manslaughter, but the intent to kill accompanied with malice, the distinguishing element between murder and manslaughter. "It has been a common practice for circuit judges, in their charges to juries, to assimilate the law in cases of first degree assault and battery to the law applicable to murder (which is entirely right), and to assimilate the law in cases of second degree assault and battery, to the law applicable to manslaughter."

The general rule in the United States is thus summarized in C. J. S., Vol. 40, page 945, as follows:

"To constitute an assault with intent to murder, the act must have been done under such circumstances that, if death resulted, the homicide would have been murder, and according to the weight of authority it is immaterial whether it would have been murder in the first or second degree."

"Except as otherwise provided by statute, an assault with intent to kill or commit manslaughter consists of an intent to kill and an overt act toward its commission, under circumstances which would have made the act manslaughter if death had ensued."

We are utterly unable to see the logic of a contention that the Act would cover a deadly assault and battery with a monkey wrench as in the case of Alpha S. S. Corporation vs. Cain, *infra*, and exclude the Jester case where death resulted from a deadly assault and battery with a pistol. According to their contention, had young Jester survived the shots after months of pain and suffering he could have recovered for his injuries under the rule announced in the Encarnacion and Cain cases, but that having died from the shots his widow and two little children would be barred from recovery.

This distinction is almost absurd, in our humble opinion, when the Act itself gives exactly the same right to the beneficiaries of a deceased to recover as it does to an employee to recover for his own injuries.

*How counsel are able to classify a deadly assault and battery with a monkey wrench in which the ship officer struck the seaman two heavy blows across the head and over the eye, (35 Fed. (2d) 719), resulting, as characterized by this Court "as seriously injuring him" (281 U. S., 643), and justifying a verdict of \$12,000 damages, which both the District Judge and the Circuit Court of Appeals refused to reduce as excessive, (35 Fed. (2d), page 723), as a "simple non-murderous assault," is beyond our power of comprehension.*

Counsel likewise attempt to distinguish the Encarnacion and Cain cases from this case by contending that in those cases the wilful acts were committed on seaman on shipboard and that a different rule applies to "conditions at sea." (Pages 10 and 11, Petition and Brief).

Surely, the attorneys for the petitioner are familiar with the language of the Merchant Marine Act, Section 688, Title 46, USCA, which gives to seamen the same rights that are given to employees of railway carriers and no more. That Act says:

"Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be

applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007."

We have so far been unable to discover any language in either the above quoted Act or in the Federal Employers' Liability Act making any distinction between the rights of seamen and railway employees in actions for injury or death.

We do not see how it is possible for a Court to speak in clearer and plainer language than this Court used in the Encarnacion and Cain cases. Beyond any possible question, the Court in those cases was construing the meaning of the word "*negligence*" as used in the Federal Employers' Liability Act. In its opinion in the Encarnacion case, the Supreme Court quoted the exact language of the Merchant Marine Act and then quoted Section 1 of the Federal Employers' Liability Act.

As to the plaintiff's right to recover, the Court said:

"He is entitled to recover if, within the meaning of Section 1, his injuries resulted from the negligence of the foreman.

"The question is whether '*negligence*,' as there used includes the assault in question." x x x x x x "The act is not to be narrowed by refined reasoning or for the sake of giving '*negligence*' a technically restricted meaning. It is to be construed liberally to fulfill the purpose for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used."

In the Cain case the Supreme Court said:

"That court expressed the opinion (35 F. (2d) 717, 721) that Section 33 of the Merchant Marine Act, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act, U. S. C. title 45, Sections 51-59, did not apply, and held defendants liable under the general maritime

law without regard to these acts. But in *Jamison v. Encarnacion*, decided this day (281 U. S., 635, ante, 1082, 50 Sup. Ct. Rep. 440) we hold that such an assault is negligence within the meaning of Section 1 of the Federal Employers' Liability Act, which is made available to seamen by Section 33 of the Merchant Marine Act. The ruling in that case controls in this."

The concluding paragraph of the Court's opinion in the *Encarnacion* case is most significant. It is as follows:

*"While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault a much graver breach of duty, was not negligence within the meaning of the act. Johnson v. Southern P. Co., supra; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S., 1, 9, 10, 51 L. Ed, 681, 685, 27 Sup. Ct. Rep. 407.'"*—  
(Italics ours.)

## UNTENABLE POSITIONS OF PETITIONER

We will devote a part of this brief in answering some of petitioner's untenable and unreasonable positions.

At page 11 of the Petition and Brief, petitioner says:

"The murderous assault by shooting twice with a pistol, in our case, could not have been made with any purpose to hurry Jester with his work or to compel him to work. Its only purpose and only possible effect were to impose capital punishment upon him and completely to stop him from work, to put an end entirely to the furtherance of the master's business until Jester's remains

could be disposed of, Black could be arrested, and a new engine crew provided. This result was inescapable from the very nature of Black's act, and no other could have been anticipated."

The results of a negligent or wrongful act by an employee are never satisfactory to an employer. In the thousands of tort cases reported in the law reports of this Country, the results of the wrongful act of the servant or agent have always been more or less disastrous to the master or employer. Viewed by subsequent mediation, no tort by an employee could ever be said to have been performed in "furtherance of the master's business."

We quote the following from our brief in the State Supreme Court:

"Just here let us point out that all such expressions as 'furtherance of the employer's business,' 'course of employment,' etc., are merely equivalent expressions of the phrase 'scope of employment or agency' and in no way change the meaning of that all important legal phrase.

39, C. J., 1282.

"The general error committed by most attorneys in dealing with this term 'scope of agency or employment,' is in attempting to isolate the culminating act resulting in the wrong and to contend that this act was without the scope of the agency. In other words, they seek to perform a surgical operation in law by severing from the assigned duty the act resulting in the injury and treat the two as entirely separate things. They then contend that the amputated act is without the scope of the agency. If this were permitted no employer would ever be held responsible for the wrongful act of his agent. We have never read or studied of a case where the employer came into Court and admitted that he had authorized his agent or servant to commit a homicide, or an assault and battery, or a slander, or any other unlawful or careless act by which another person was injured or killed.

"The true test is whether or not the wrongful act grew out of the employment or was an act perpetrated by the servant in his own behalf or interest."

On page 15 of their present brief, petitioner's counsel seek to weaken the effect of the Encarnacion case by citing decisions in which an attempt is made to distinguish that case.

The Encarnacion opinion is a masterful decision of this Court. It was pronounced in May, 1930, and its clear and positive language has never been modified, changed or added to by this Court in fourteen years.

Both here and in the State Court, petitioner placed great faith and reliance in the opinion of the case of *Lykes Bros. S. S. Co. v. Grubaugh*, 128 Fed. (2d), page 387. A study of this decision demonstrates again the recklessness with which petitioner's attorneys cite cases as authority. This was an action by a ship steward against the owner for damages for an assault and battery committed upon him by the chief and assistant engineers. The main issue in that case was whether or not the engineers had any authority over the steward. The men were in separate departments and were not then engaged in any common business for the employer.

The opinion of the Circuit Court of Appeals, reversing a judgment of the District Court in plaintiff's favor, indicated a clear approval of the Encarnacion and Cain cases and pointed out that in those cases it was an assault by superior officers upon subordinate employees "whom the assailant had the power and authority to direct," etc. What makes this decision burst like a bubble in the petitioner's face is the concluding paragraph, as follows:

"Though we believe that no case was made out and that the judgment must be reversed, we are not of the opinion that it ought to be reversed with directions to enter judgment. We think rather that the judgment should be reversed and the cause remanded for trial anew, this time upon depositions and full testimony upon the issues of fact and of law as to the authority, if any, the engineer

had over plaintiff, and whether he was, at the time of the fight, undertaking to exercise it in carrying out his master's business."

The record shows too that Circuit Judge McCord wrote a strong dissenting opinion in the Lykes case, saying that the issues "were properly submitted to the jury," and relied entirely upon the Encarnacion and Cain cases.

### CONJECTURE vs. INFERENCE

Throughout this case petitioner because it believed that only Engineer Black knew exactly what was said in the final act culminating in the shooting that only by "conjecture" could the widow of the deceased show that the engineer was acting within the scope of his agency. It is true that a verdict cannot rest upon "conjecture" but it is always upheld upon proper "inference" drawn from facts established either by direct or circumstantial evidence.

We again extract the following authority from our State Court brief:

"There is a vast difference between 'conjecture' and 'inference.' In Vol. 15 C. J. S., page 972, we find the following definition of conjecture:

"An idea or motion founded on a probability without any demonstration of its truth, an idea or surmise inducing a slight degree of belief, founded upon some possible, or, perhaps, probable fact, of which there is no positive evidence, supposition or surmise, or the lowest degree of presumption.

"The term may be employed as synonymous with 'guess' and 'guess-work' but has been distinguished from 'inference,' 'necessary implication,' and 'speculation.'

"On the contrary, an inference is a conclusion drawn from an established fact, or growing out of an established fact.

"In 31 C. J., page 1181, we find the following definitions given as to the meaning of the word 'inference.' :

"A conclusion drawn by reason from premises established by proof; a conclusion in favor of the existing one from others proved; a conclusion which, by means of data founded upon common experience, natural reasons frays from facts which are proved: a deduction from facts proved; a deduction or conclusion from facts or propositions known to be true, a deduction which the trier may or may not make according to his own conclusions; a permissible deduction from the evidence; something inferred from precedent matter, separated from which it is a mere absurdity of language."

### RESPONDENT'S PRINCIPAL AUTHORITIES

We prepared a trial brief before Judge Dennis in the lower Court. In this brief we pointed out that five decisions of this Court were the only ones directly affecting the law involved.

We reprinted our analysis of these five cases in our printed brief before the Supreme Court. These five decisions, in chronological order, are:

*James C. Davis, Director General of Railroads, etc., vs. Mrs. Maude E. Green, Administratrix of the estate of Jesse Green, deceased.* 260 U. S., 349; 67 L. Ed, 299; 43 S. Ct. 123.

*Atlantic Coast Line Ry Co., vs. Ida Mae Southwell, Admx. of H. J. Southwell.* 275 U. S., 641; 48 S. Ct. 25 72 L. Ed. 257.

*Inez M. Jamison et al., vs. Valentine Encarnacion,* 281 U. S., 635; 50 S. Ct. 440; 74 L. Ed., 1082.

*Alpha Steamship Corp., et al., vs. Robert Cain,* 281 U. S., 642; 50 St. 443; 74 L. Ed. 1086.

*Nelson v. American-West African Line,* 86 Fed. (2d),

page 730. Certiorari denied—300 U. S., 665; 81 L. Ed. 873.

We will reproduce the same analysis of the first four cases as an appendix of this brief.

We feel that these cases are of so much importance that it will be helpful to the Court to have them where they are handy of use in studying the case.

## THE CASE OF NELSON V. AMERICAN WEST AFRICAN LINE

We think the above entitled case is sufficient to justify the Court in denying the Writ of Certiorari, thereby refusing to give the petitioner a sixth hearing on its contention that there was no evidence to go to the jury that at the time of the fatal act Engineer Black was acting within the scope of his agency as engineer.

This Court refused certiorari in the Nelson case, *supra*, and we respectfully submit that the facts here are much stronger than in that case.

In its memoranda opinion filed on March 1, 1937, this Court does not assign any reason or authority for its decision to deny the Writ of Certiorari, but we are convinced that it was upon authority of the Encarnacion and Cain cases, *supra*. We submit the following analysis of the Nelson case:

John A. Nelson was an able seaman upon the steamer "West Irmo." While the ship was lying in a port on the Congo River near midnight, the ship's boatswain made a murderous assault upon the plaintiff. The Circuit Court of Appeals of the Second Circuit gave this statement of the facts:

"The theory of the action was that the boatswain was acting within the scope of his authority, and that the statute created a cause of action against the owner under the doctrine of *Jamison v. Encarnacion*, 281 U. S., 635, 50 S. Ct. 440, 74 L. Ed, 1082; and *Alpha S. S. Corp'n. vs.*

*Cain*, 281, U. S., 642, 50 S. Ct. 443, 74 L. Ed., 1086. In the light of those decisions no issue remains except whether the boatswain was so acting, as to which the evidence is as follows: 'The 'West Irmo' had but one boatswain; he had been off duty ashore, where he got roaring drunk, and came aboard at night with much noise, disorder and violence. He first chased the carpenter into the lavatory, and tried to break through the door to get at him; he then went back into the mess room, where he furiously raged about for a while, until the notion seized him to go into the crew's quarters, where the plaintiff was trying to sleep. It was still a half hour before midnight when the plaintiff was to go on watch, but the boatswain apparently had a mad idea that the plaintiff should get up and go on deck at once, for as he struck him, he cried out to him, 'Get up, you big son of a bitch, and turn to.' Having roused him by the first blow, he engaged in a fight with him in which the plaintiff was further injured. The boatswain kept no watches, but worked as occasion required; he had authority to call out all hands when he thought best and did so, for example, on leaving port, or in stress of weather. Like other boatswains, he was foreman, so to say, of the crew. The judge thought that at the time of the assault he was not acting for the ship and dismissed the complaint.' "

In dealing with the law of the case, the Court said:

" 'When the case of *Alpha S. S. Corp. v. Cain*, *supra*, was before us, *Cain v. Alpha S. S. Co.*, 35 F. (2d) 717, we discussed the question now at bar. The circumstances were indeed different because the superior officer was on duty at the time, but the plaintiff did not, and could not, assert that the assault in fact was in aid or discipline on board the ship, or that it was not in part actuated by motives which had nothing to do with the owner's interest. A principal is not chargeable with wilful acts, intended by the agent only to further his own interest, not done for the principal at all. *Davis v. Green*, 260

U. S., 349, 43 S. Ct. 123, 67 L. Ed., 299; *Bonsalem vs. Byron, S. S. Co.*, 50 F. (2) 114 (C. C. A. 2); *Sibley vs. Barber S. S. Lines* (D. C.), 57 F. (2d), 318. Restatement of agency, Section 235. But motives may be mixed, men may vent their spleen upon others and yet mean to further their master's business; that meaning, that intention is the test. *Pennsylvania Mining Co. v. Jarnigan*, 222 F. 889 (C. C. A. 8); *Whitted v. Southwestern T. and T. Co.*, 231 F. 926, (C. C. A. 8); *Schultz v. Brown*, 256 F. 187, 191 (C. C. A. 9); *Thompson-Starrett Co. v. Heinfeld*, 60 F. (2d), 360 (C. C. A. 3); *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, 551; *Magar v. Hammond*, 183, N. Y. 387, 390, 391, 76 N. E., 474, L. R. A. (N. S.) 1038; Restatement of Agency, Section 236, Section 245, comment (d). In the case at bar the boatswain may indeed have had no other purpose than to do violence to anyone who fell in his way; unless there was some evidence that he supposed himself engaged upon the ship's business, the ship was not liable. In support of the conclusion that he did not so suppose, the ship argues that there was no occasion for him to intervene at all; that the plaintiff had nothing to do till he went on watch which was half an hour off; and that there was every reason to suppose that he would do his duty when his turn came. In truth, it was at best an act of wanton tyranny to get him out of his bunk at that time, to say nothing of the violence used in effecting it. But the boatswain was blind drunk and through his clouded mind all sorts of vague ideas may have been passing; the fact that he had made himself incompetent to further the ship's business was immaterial, the owner had selected him to command, whatever his defects and his addictions. If he really meant to rouse the plaintiff and send him upon duty, if he really meant to act as boatswain and for the ship, however imbecile his conduct it was his master's. We are disposed to think that when he told him not only to get up, but to 'turn to,' that order was some evidence that he meant to act for the ship, and not alone to satisfy his vindictive

passions. Normally when an officer, drunk or sober, tells a man to go to his duty, it is not for the mere show of authority, but at least in part because he supposes that some work should be done. The best that an owner can ask in such a case is that if the jury believes that the order, though in form in the ship's behalf, was given only in vainglory, he shall not be charged. The result does not depend upon the scope of the boatswain's authority in the ordinary sense; we have not to say whether an act, for example forbidden by the master, should nevertheless be imputed to him. There is here no doubt that if the boatswain intended to act for the ship at all, his command was within his powers; he had been authorized to order any seaman to any work at any time; the order was within not only his apparent authority—whatever that phrase may mean—but within his express authority. The inquiry into the tangled mazes of a drunken boatswain's mind may be beyond the powers of a jury, but it is the fact upon which the case turns, and there was enough to justify them in finding that he supposed that he was acting as boatswain and not wholly as a petty tyrant. It does not indeed follow that the subsequent affray was in the same class as the original blow, but that is a matter to be dealt with when the judge charges the Jury.' ”

With this statement of facts and the law, as laid down by the Circuit Court of Appeals, this Court refused to interfere and denied certiorari.

Clearly this Court believed that it was a plain jury issue.

### RECENT UNITED STATES SUPREME COURT DECISIONS

We think the recent cases of *Tiller v. At. Coast Line Ry. Co.* 318 U. S., page 54; 87 L. Ed., 610; 63 S. Ct. 444; and *Florence J. Bailey, as Administratrix, vs. Central-Vermont R. Co.*, 319 U. S. page 350; 87 L. Ed., 1444, 63 S. Ct. 1062; correctly state

the rule as to the direction of verdicts by a Court under the Federal Employers' Liability Act.

### CONCLUSION

In conclusion we emphasize the language of the Circuit Court of Appeals for the Second Circuit in the Cain case, *supra*, to-wit:

"The evidence made it a jury question whether he committed the assault as an officer of the ship, in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blow in a private brawl."

We have maintained throughout that in this case it was a question for the jury as to whether Engineer Black killed the deceased as a superior officer in an effort to enforce "his orders as engineer upon the deceased in the performance of his duties as fireman." (R. Folio 23, page 8), or fired the shots in a "private brawl" or personal difficulty totally disassociated with his duty as engineer.

This widow and two fatherless children have been patiently standing in the "Halls of Justice" since last June. Five times they have heard State tribunals reject petitioner's appeals to send them forth empty-handed.

We cannot believe that the highest Court in the land will say that the death of their sole support, literally at his post of duty, shall stand forever without recompense.

*Respectfully submitted,*

JAMES H. PRICE,

JAMES D. POAG,

*Attorneys for the Respondent.*

